

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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|--|---|----------------|
| In the Matter of the Petition                        | : |                |
| of   | : |                |
| <b>SHIQING YUE AND XIAOWEN FENG</b>                  | : | DECISION       |
|  | : | DTA NO. 819259 |
| for Redetermination of a Deficiency or for Refund of | : |                |
| New York State and City Personal Income Tax under    | : |                |
| Article 22 of the Tax Law and the New York City      | : |                |
| Administrative Code for the Year 2001.               | : |                |

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Petitioners Shiqing Yue and Xiaowen Feng, 213-58 36<sup>th</sup> Avenue, 2<sup>nd</sup> Floor, Bayside, New York 11361, filed an exception to the determination of the Administrative Law Judge issued on April 15, 2004. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioners are entitled to the claimed earned income credit where Xiaowen Feng and the qualifying children do not have social security numbers.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Shiqing Yue and Xiaowen Feng, filed a New York State Resident Personal Income Tax Return (Form IT-200), filing status “married filing joint return,” for the year 2001 in which they requested a refund of \$1,678.00. On the return, petitioners claimed an earned income credit (“EIC”) of \$318.00.

The income tax return indicates a social security number for petitioner Shiqing Yue, and an individual taxpayer identification number for petitioner Xiaowen Feng. On the attached Claim for Earned Income Credit (Form IT-215), Line 4 lists two qualifying children of petitioners, both of whom are identified by an individual taxpayer identification number.

The Division of Taxation (“Division”) issued to petitioners, on May 17, 2002, a Statement of Income Tax Adjustment which reduced the refund claimed to \$1,297.00 by disallowing the EIC of \$318.00 and one-half of the New York City Star Credit.

Following a protest by petitioners to the disallowance of the EIC in the Statement of Income Tax Adjustment, the Division issued the following explanation to petitioners on September 17, 2002:

In order to claim the earned income credit, your spouse and any qualifying children MUST have a valid social security number issued by the Social Security Administration. You cannot get the earned income credit if, instead of a social security number, you, your spouse or children have an individual taxpayer identification number (ITIN) which was issued by the Internal Revenue Service to noncitizens who cannot get a social security number.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 606(d), determination of the State earned income credit is based solely on a percentage of the Federal credit. He also noted that, among other requirements under Federal law, an individual and his or her spouse, where the taxpayers are filing a joint income tax return, as well as the qualifying children, must have a valid social security number in order to qualify for the earned income credit. The Administrative Law Judge concluded that since neither petitioner Xiaowen Feng nor the two claimed children had valid social security numbers, petitioners were not entitled to the earned income credit.

The Administrative Law Judge denied petitioners' equal protection claim, holding that petitioners offered no evidence that they had been treated differently from any other taxpayer denied the earned income credit due to the lack of a social security number of either a spouse filing a joint return or of the qualifying children.

***ARGUMENTS ON EXCEPTION***

In support of their exception, petitioners argue that since no social security number is required in order to pay tax, all taxpayers should be treated equally in being allowed to take advantage of an available tax credit. Petitioners maintain that it is a denial of equal protection as well as unfair to require taxpayers to obtain a social security number before becoming eligible for the earned income credit.

***OPINION***

Tax Law § 606(d)(1) provides that a taxpayer shall be allowed an earned income credit equal to 25% of the earned income credit allowed pursuant to Internal Revenue Code ("IRC")

§ 32 for the same taxable year. Section 32, in turn, provides that no earned income credit is allowed to an eligible individual who does not provide a taxpayer identification number on their income tax return for themselves, their spouse or qualifying child or children (*see*, IRC §§ 32[c][1][F],[G] and 32[c][3][D]). Specifically for purposes of IRC § 32(c)(1)(F) and (c)(3)(D), a “taxpayer identification number” means a social security number (IRC § 32[m]).

Petitioners request that we find certain sections of IRC § 32 unconstitutional because they deny petitioners equal protection of the law. As we stated in *Matter of Eisenstein* (Tax Appeals Tribunal, March 27, 2003):

The Division of Tax Appeals is a forum of limited jurisdiction and is not authorized to determine the facial constitutionality of statutes (*Matter of J.C. Penney Co.*, Tax Appeals Tribunal, April 27, 1989; *Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988).

Further, although this Tribunal has jurisdiction to determine if a statute is unconstitutional as applied to petitioners (*Matter of David Hazan, Inc.*, Tax Appeals Tribunal, April 21, 1988, *confirmed Matter of David Hazan, Inc. v. Tax Appeals Tribunal*, 152 AD2d 765, 543 NYS2d 545, *affd* 75 NY2d 989, 557 NYS2d 306), the taxpayers bear the burden of proving that a statute, as applied, is unconstitutional (*Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992). As the Administrative Law Judge correctly concluded, petitioners offered no evidence that they had been treated differently from other taxpayers who were denied the earned income credit due to the lack of a social security number of either a spouse filing a joint return or of the qualifying children.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case.

Petitioners have offered no evidence below, and no argument on exception, that would provide

a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Shiqing Yue and Xiaowen Feng is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Shiqing Yue and Xiaowen Feng is denied.

DATED: Troy, New York  
July 7, 2005

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner